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September 4, 2013

Joseph Anthony Ureneck
2 Marlowe Street
Dorchester, MA 02124

Re: Initiative Petition No. 13-18: Law Relative to Shared Parenting

Dear Mr. Ureneck:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year.

I regret that we are unable to certify that this measure complies with the requirements of Article 48, the Initiative, Part 2, Sections 2 and 3. Section 2 states in pertinent part that "No measure that relates . . . to the powers . . . of courts . . . shall be proposed by an initiative petition." As explained below, Petition No. 13-18 relates to the powers of courts, and thus the petition cannot be certified. Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed law.

The proposed law's substantive provision would require (with emphasis added) that "in all court cases concerning child custody, current laws notwithstanding, the presumption that both parents have the right to shared and equitable physical and legal custody shall have precedence in determining said custody." The main purpose of the petition relates to the powers of courts, and thus it is excluded from the initiative process. See Mazzone v. Attorney General, 432 Mass. 515, 519-22 (2000) (explaining that "powers of courts" exclusion focuses on "main purpose" or "main design" of proposed law).

As its proponent explained, the "powers of courts" exclusion was aimed in part at preventing "initiative petitions which will agitate up and down the State [regarding] matters of injunctions and that sort of proposition." 2 Debates in the Massachusetts Constitutional Convention 1917-1918, 991 (1918) (remarks of Mr. Dutch) (emphasis added); see id. at 791-97 (indicating Mr. Dutch's sponsorship of "powers of courts" exclusion). That is, the initiative petition process was not to be used as a vehicle for popular debate over, and the enactment of laws restricting (or expanding) the powers of courts. Certifying Petition No. 13-18 would lead to exactly that result.

In Albano v. Attorney General, 437 Mass. 156, 159 (2002), the court said:

> Previously, when we have held that a referendum "relates to ... the powers ... of courts," the measure at issue dealt exclusively and explicitly with the power to decide cases or enforce decisions. Custody of a Minor (No. 1), 391 Mass. 572, 578 (1984) (statute authorizing consolidation of related custody and adoption actions brought initially in different trial courts). Kagan v. United Vacuum Appliance Corp., 357 Mass. 680, 682 (1970) (measure establishing court's long-arm jurisdiction). These provisions did not simply change the substantive law enforced by the courts; they altered the courts' basic ability to render decisions in an entire category of cases, thus imposing the type of impact on courts' powers that art. 48 envisioned. By contrast, when an initiative petition only alters the substantive law enforced by the courts, the work of the courts is affected in an incidental way; it cannot be said that the "main feature" of that petition is to alter the power of the courts. Commonwealth v. Yee, 361 Mass. 533, 537 (1972), quoting Horton v. Attorney Gen., [269 Mass. 503], 511 [(1930)] ("A general law covering a subject disconnected with courts in its main feature does not come within the prohibition of . . . art. 48 . . . because, in an incidental and subsidiary way, the work of the courts may be increased or diminished or changed"). See Mazzone v. Attorney Gen., supra at 522, (petition expanding category of defendants who may request diversion into drug treatment programs not within exclusion); Horton v. Attorney Gen., supra at 511-512 (initiative petition creating automobile insurance fund and repealing judicial review of automobile security rates not within exclusion).

Petition No. 13-18's proposed law would "alter[] the courts' basic ability to render decisions in an entire category of cases, thus imposing the type of impact on courts' powers that art. 48 envisioned." Albano, 437 Mass. at 159. The proposed law "refer[s] directly to the powers of the court," and its effect on court powers is not merely "incidental." Yee, 361 Mass. 533 at 538. Nor is the scope of the powers-of-courts exclusion limited to measures that affect courts' "administrative powers." See, e.g., Kagan, 357 Mass. at 682 (1970) (law establishing court's long-arm jurisdiction related to powers of courts); Commonwealth v. Sacco, 255 Mass. 369, 410 (1926) (law empowering Superior Court to grant new trials at any time before sentencing was law relating to powers of courts).

For the foregoing reasons, the law proposed by Petition No. 13-18 impermissibly relates to the powers of courts and thus cannot be certified under art. 48.

Very truly yours,

Peter Sacks
State Solicitor
617-963-2064

cc: William Francis Galvin, Secretary of the Commonwealth